No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1951

SUTPHEN ESTATES, INC., APPELLANT

v.

UNITED STATES OF AMERICA ET AL.

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BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The district court did not render an opinion on denial of appellant's motion for leave to intervene. Two prior opinions rendered by the district court in the proceeding in which appellant sought to intervene are reported in 66 F. Supp. 323 (reversed in part and affirmed in part, 334 U. S. 131), and 85 F. Supp. 881 (R. 42–74), affirmed *per curiam*, 339 U. S. 974.

JURISDICTION

The district court entered a consent decree against Warner Bros. Pictures, Inc., and certain of its subsidiaries on January 4, 1951 (R. 8–30),

and entered an order denying appellant's motion for leave to intervene on February 26, 1951 (R. 31–32). The petition for appeal from this order and from the consent decree was filed and allowed on March 2, 1951 (R. 119–120, 122). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. Code 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. On May 14, 1951, this Court postponed the question of its jurisdiction of the appeal to the hearing on the merits (R. 226).

QUESTIONS PRESENTED

(1) Whether appellant might be "bound" by the consent decree entered against Warner or might have been "adversely affected" by a disposition of property which was in the "custody" or "control" of the district court, so as to confer upon appellant a "right" to intervene under Rule 24 (a) of the Federal Rules of Civil Procedure.

(2) Whether the claim on which appellant sought intervention and the main action had a question of law or fact in common so as to provide basis for "permissive intervention" under Rule 24 (b), and, if so, whether the district court's order denying intervention was an abuse of discretion.

(3) Whether, apart from the Rules governing intervention, the district court was under a duty

to grant appellant the relief for which it sought intervention.

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *. [15 U. S. C. 4.]

Section 24 of the Federal Rules of Civil Procedure provides in part:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * *. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

The proceeding in which appellant sought to intervene was brought in 1938 under Section 4 of the Sherman Act against the eight leading distributors of motion-picture films. In 1940 a consent decree, running for a trial period of three years, was entered against the five major defendants—Fox, Loew's, Paramount, RKO and Warner[1]—who were exhibitors as well as distributors of films. At the end of the three-year period the Government moved for trial against all the defendants. The case was heard by a three-judge district court,[2] which held that all the de-

[1] Their respective corporate titles are Twentieth Century-Fox Film Corporation, Loew's Incorporated, Paramount Pictures, Inc., Radio-Keith-Orpheum Corporation, and Warner Bros. Pictures, Inc.

[2] The court was convened pursuant to the provisions of Section 1 of the Expediting Act, 32 Stat. 823, as amended by the Act of April 6, 1942, 56 Stat. 198, 15 U. S. C. 28.

fendants had violated the Act (*United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323). On appeal from the district court's judgment (reported in 70 F. Supp. 53), this Court affirmed in part and reversed in part, and remanded the cause for further proceedings in conformity with the Court's opinion. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

Under the opinion of this Court, one of the major issues to be explored upon remand was whether the five majors were engaged in monopolizing or in a conspiracy to monopolize the exhibition of films (334 U. S. 166–175). Prior to the district court's determination of the issues committed to it by the remand, the Government and RKO[3] agreed upon the provisions of a consent decree, which was entered on November 8, 1948, disposing of all issues in the case as to RKO (R. 125–143). A consent decree against Paramount, terminating the cause as against it, was likewise entered prior to any adjudication by the district court on remand (R. 143–193).

The RKO and Paramount decrees each provided, among other things, that the defendant's exhibition business should be separated from its production and distribution business. This was to be effected by carrying out a reorganization which involved: (1) creating a new theatre company and a new picture company; (2) transfer-

[3] Each reference herein to a major defendant includes those of its subsidiaries named as defendants.

ring to the former the defendant's theatre assets and to the latter the defendant's other assets, in exchange for the stock of the two new companies; (3) dissolution of the defendant so that its stockholders should receive, on a pro rata basis, stock of the two newly created companies (R. 126, 140, 183–184).[4]

On July 25, 1949, the district court ruled that the major defendants' vertical integration had served to effectuate defendants' conspiracy to fix prices, runs and clearances, and that adequate assurance against further violations of the Act required divorcement of the defendants' exhibition business from their production and distribution business (R. 62–63, 66–68). A final judgment entered against the three remaining major defendants (Fox, Loew's, and Warner) on February 8, 1950, provided for the submission within six months of plans for such divorcement, which were to be completed within three years from date of entry of the judgment (R. 2, 5).

Negotiations between the Government and Warner resulted in agreement upon a consent decree to be in lieu of the judgment against

[4] In each decree there were supplementary provisions designed to insure that the two newly created corporations should be operated wholly independently of one another. See Sections II–B, III–E, IV–V, VI–B of the RKO decree (R. 128–129, 139–141) and Sections IV–VI of the Paramount decree (R. 182–190).

Warner entered on February 8, 1950 (R. 8–31).[5] This decree, in addition to general injunctive provisions (Secs. III–IV, R. 9–13) and detailed provisions for divestiture of theatres (Sec. V, R. 13–25), required Warner to submit to its stockholders, within 90 days after entry of the decree, a "plan of reorganization" to effect divorcement of its theatre assets from its production and distribution assets (Sec. VIA, R. 25). The decree states that such plan shall provide that all of Warner's theatre assets shall be transferred to a new theatre company and all of its production and distribution assets to a new picture company;[6] that each of the new companies shall distribute its capital stock pro rata to Warner's stockholders, in exchange for the assets received by it; and that Warner shall thereupon be dissolved (Sec. VIA, R. 25). The new theatre company is not to engage in the distribution business, or the new picture company in the exhibition business, except with permission granted by the court upon a showing that competition in distribution or exhibition will not thereby be unreasonably restrained (Sec. VIB, R. 25). War-

[5] To allow more time to complete these negotiations, the time within which Warner should submit a plan for separating its exhibition business from its production and distribution business was, by stipulation, extended to January 15, 1951.

[6] Assets not within either of these categories were to be transferred to one or the other of the two new companies.

ner is to cause each of the new companies to file its consent to be bound by the terms of the decree applicable to it (Sec. VIC, D, R. 25–26), and within 27 months after entry of the decree, the two new companies are to be operated wholly independently of one another (Sec. VIIA, R. 26).

The divorcement to be effected by the foregoing plan of reorganization was a crucial element of the consent decree. The decree provides that if Warner's stockholders shall not have approved the proposed reorganization within 90 days after entry of the decree, the decree "shall be of no further force and effect" and the cause "shall be restored to the docket without prejudice to either party" (Sec. I, R. 9).

The consent decree was presented to the district court on January 4, 1951 (R. 206–207). Two days earlier appellant had filed its motion for leave to intervene (R. 36–41) and had procured an order to show cause why its motion should not be granted (R. 32–33). The motion, which was supported by an affidavit of counsel (R. 33–36), alleges:

On December 31, 1928, appellant leased property in New York City on which the Strand Theatre is located for a term of approximately 98 years to Stanley Mark Strand Corporation, a wholly owned subsidiary of a corporation which is almost a 100% subsidiary of Warner (R. 36–37). The current rental, and the minimum rental for the remainder of the lease, is $300,000 a year,

and the lessee is obligated to pay taxes, water rates, insurance premiums, etc. (*ibid.*). The original lease provided that the lessee would erect a new theatre and office building on the premises, but in December 1948 the parties agreed to substitute for this obligation an obligation to improve the present buildings on the premises at an estimated cost of $1,000,000 (R. 37). The agreement also provided that, in order to secure this obligation, the lessee should deposit with the trustee $100,000 a year for ten years, beginning December 15, 1948 (R. 38).[1] Warner, by agreement made with appellant in 1931, guaranteed that the lessee would perform all the terms, covenants and conditions of the lease (R. 37) and Warner, as guarantor, consented to the modification of the lease made in December 1948 (R. 38).

Appellant's motion sets forth as ground for intervention that its rights under Warner's guaranty may be destroyed if, pursuant to the reorganization provided for in the consent decree, Warner distributes all of its assets and then dissolves (R. 40). The prayer for relief was (1) that the court refrain from signing the consent decree until it had been amended in such a way that it would either "assure preservation of" Warner's guaranty or provide a "fully equivalent substitute" therefor, or in the alter-

[1] Prior to the filing of appellant's motion to intervene, the lessee had made three such payments totaling $300,000 (*ibid.*).

native, (2) that the court "by separate order" direct that Warner's guaranty obligation be preserved or that a fully equivalent substitute therefor be provided (R. 41).

At a hearing on January 4, 1951, the district court heard argument on appellant's motion for intervention and denied the motion (R. 217–222). At the same hearing the court approved the consent decree after its major provisions and purposes had been outlined by counsel for the United States (R. 207–216, 222). After the court had entered the consent decree and an order denying intervention, appeal was taken to this Court from said decree and said order (*supra*, p. 2).

SUMMARY OF ARGUMENT

I

Appellant had no right of intervention under Rule 24 (a) of the Federal Rules of Civil Procedure. Clause (2) grants such right when the applicant for intervention is or may be "bound" by the court's judgment, but appellant was not a party to the proceeding below nor did it assert rights as to which it was in privity with a party. The consent decree is not *res judicata* of appellant's rights, and the district court acted upon the basis that appellant would be free to assert in other proceedings the rights which it claims. And if, as the parties to the main action view the consent decree, it implicitly bars assumption of Warner's guaranty by the new picture company,

one of the two transferees of its property, appellant is not "bound" by the decree because it does not deprive appellant of any legally protected right. The decree does not prevent appellant from obtaining from the new theatre company, Warner's other transferee, the full measure of the legal right which it claims—a judicially ascertained equivalent of Warner's guaranty.

Appellant is also not within clause (3) of the Rule, which grants intervention when the applicant will be "adversely affected" by a distribution of property in the "custody" or "control" of a court. The antitrust action is an *in personam* proceeding against Warner and its property was not in the custody or control of the district court. In addition, appellant has merely an unsecured contract claim against Warner. It has no interest in or lien on Warner's property. Unless the applicant for intervention has a definite interest in property in the court's custody, he is not "adversely affected," within the meaning of the Rule, by the court's disposition of the property in its hands. Moreover, apart from appellant's lack of any property interest adversely affected, its contract claim is not adversely affected by the consent decree entered by the district court. Even if the decree bars assumption of Warner's guaranty by the new picture company, appellant is affected only in the sense that the assets standing behind the Warner guaranty are depleted to the extent of those which will pass

to the new picture company. But any final money judgment against Warner would likewise deplete its assets. Accordingly, if depletion of a debtor's assets by a court judgment is enough to give a right to intervene, any holder of a direct or contingent claim has the right to come into almost any action against his debtor or guarantor. Plainly the Rule on intervention of right was not intended to have this vast reach.

II

There was no basis for permissive intervention under Rule 24 (b) since appellant's claim and the main action had no question of law or fact "in common." Appellant's claim involved the liability of Warner's transferees on Warner's guaranty contract, whereas the main action involved the provisions to be included in the court's judgment in order to assure Warner's compliance with the Sherman Act. Appellant's claim did not involve these questions, and appellant has disclaimed any attack upon either the divorcement which the district court had adjudged to be requisite or the means for achieving it incorporated in the consent decree.

In any event, denial of intervention was not an abuse of discretion and hence is not reviewable. Various considerations furnish ample support for the court's exercise of its discretion. Intervention would have seriously interfered with and delayed adjudication of the rights of the parties in the main action, which has been long pending.

Appellant's claim of possible injury was speculative and determinable only in the light of unknown future factors. Appellant was free to obtain in other proceedings the judicial ascertainment of its rights which it sought to interject into the antitrust action against Warner.

ARGUMENT

Introductory Statement

The Court's jurisdiction of the appeal. An order denying intervention "depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable[8] * * * *. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable * * *." *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio R. R. Co.*, 331 U. S. 519, 524–525. See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 558. It is the Government's position that there was neither intervention of right nor an abuse of discretion in the instant case. Hence, if this appeal were solely from the order denying intervention and no final judgment in the main action had been entered, the Government believes that this Court would have no jurisdiction of the appeal.

[8] Cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 508, where denial of intervention rights specifically granted by a prior judgment was held to be a definitive adjudication and so appealable.

This is not, however, a separate appeal from the order denying intervention. The final judgment in the main action (the consent decree) has been entered and appellants have appealed from that judgment as well as from the order denying intervention. In these circumstances, the appeal should probably be treated as attacking the consent decree upon the ground of wrongful denial of intervention (*Allen Calculators* case, *supra*, at p. 142), so that this Court would have jurisdiction to review, but there must be affirmance of the judgment below if there was no intervention of right and no abuse of discretion in denial of permissive intervention (*Brotherhood of Railroad Trainmen* case, *supra*, at pp. 524–525).[9]

I

Appellant is not within the provisions of Rule 24 (a), which governs "intervention of right"

Clauses (1), (2), and (3) of Rule 24 (a) of the Federal Rules of Civil Procedure set forth the circumstances under which there is intervention as of right. While a third party has a right to intervene, apart from the categories defined by the Rule, if a prior judgment in the cause has granted it this right, in that situation the foundation of the right is the court's prior judgment and the matter lies outside the general doctrines of intervention codified in Rule 24 (a). *Missouri-*

[9] We do not believe that the *California Cooperative Canneries* case, *supra*, is to the contrary. The context of the reference (279 U. S. at 556) to decisions holding denial of intervention not appealable indicates that the Court was speaking of *separate* appeals from denial orders.

Kansas Pipe Line Co. v. *United States*, 312 U. S. 502, 506–508. The present appellant neither has nor claims any right to intervention independent of the Rule and it can prevail on appeal only if it shows it has a right to intervention coming within the scope of Rule 24 (a).

Clause (1). This clause grants intervention of right "when a statute of the United States confers an unconditional right to intervene." No federal statute applicable to the proceeding below confers an unconditional right to intervene (*Allen Calculators Co., Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 140–141), and appellant does not contend that it is within the scope of clause (1).

Clause (2). This clause grants intervention of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." There is a right to intervene only if both of these requirements are met.[10] We propose to show that appellant cannot be bound by the consent decree entered by the district court and that appellant therefore has no right of intervention under clause (2).

Appellant was not a party to the proceeding below. It is thus not directly bound by the decree which the district court entered. It is like-

[10] *Cameron* v. *President and Fellows of Harvard College*, 157 F. 2d 993, 996 (C. A. 1); *Moore's Federal Practice*, 2d ed., chap. 24, ¶ 24.8.

wise not indirectly bound as a privy of Warner. It asserts rights adverse to those of Warner, not rights bottomed on or derived from those of Warner. The consent decree entered against Warner therefore does not conclude appellant and is not res judicata of its rights under Warner's guaranty contract.

Where a court rules, as here, that a person seeking intervention has no "legal right" to intervene, a necessary premise of the ruling is that the judgment entered in the cause will not bind the person denied intervention. In *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315, the Court quoted and "adopted" (p. 315) a statement in the opinion of the Circuit Court of Appeals that the rule is well settled that an order denying intervention "is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding."

In *Cameron* v. *President and Fellows of Harvard College,* 157 F. 2d 993 (C. A. 1), Harvard College had brought suit against the City of Providence alleging that there had been a misapplication of the income from property which a decedent had bequeathed in trust to the city and that, under the terms of the will, this misapplication constituted a forfeiture of the trust and the trust *res* passed to the college in trust for certain specified purposes. The district court

refused to permit the decedent's executrix and sole heir at law to intervene and the appellate court affirmed the order denying intervention. The court, in holding that there was no right to intervene under clause (2) of Rule 24 (a) said (p. 996):

> * * * the applicant cannot be bound by any judgment in that action since it is one in personam * * *. Thus any judgment therein can bind only the parties and those in privity with them, which the applicant is not.

In the present case the district court acted upon the basis that appellant would be free to assert in other proceedings its claimed right to obtain the equivalent of Warner's guaranty. Neither the court nor Warner's counsel viewed the consent decree as res judicata of appellant's rights. After Warner's counsel had stated (R. 220):

> What you are doing is to order the separation of these companies and a dissolution. We have to dissolve under the provisions of the State statute. And every State in its provisions about dissolution has provisions for taking care of such contingent obligations.

and had stated (R. 221) that "when we begin our dissolution proceedings under the State statute" the appellant "has every opportunity to be properly taken care of," there were the following re-

marks by members of the court and appellant's counsel (R. 221):

> Judge HAND: We shall have to deny this application.
>
> Mr. SHIPMAN: May I ask that it be denied without prejudice to another application, if you find we are hurt?
>
> Judge HAND: No, you have got your proper remedies in these dissolution proceedings at other times.
>
> Judge GODDARD: Doesn't the State law provide that?

The consent decree does not explicitly adjudicate the liability of Warner's transferees for its obligations. While the decree requires transfer of Warner's assets to two new companies and dissolution of Warner, it is silent on the subject of satisfying or fulfilling Warner's outstanding obligations. The decree allows flexibility in this respect and Warner, in the reorganization plan which it adopted, availed itself of the latitude thus given it.[11]

Even if the consent decree implicitly bars assumption of Warner's guaranty by the new picture company, appellant is not thereby "bound" since it is free to obtain in other proceedings

[11] See Warner's proxy statement (p. 6), attached to its notice (dated January 11, 1951) of annual stockholders meeting. The proxy statement is on file with the Securities and Exchange Commission and is referred to and quoted from in

vindication of its rights under the guaranty. The farthest reach of these rights, and all that appellant demands, is judicial ascertainment and award of the "equivalent" of the guaranty. When the matter is put to judicial test the new theatre company's guaranty (through assumption of Warner's guaranty) should be found to

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appellant's brief (pp. 11–12). The reorganization plan set forth in the proxy statement was approved by Warner's stockholders (R. 224–225).

The plan provides as follows for Warner's obligations and liabilities:

(1) Of Warner's $9,546,000 of long-term notes payable to banks, the new theatre company is to assume one-fourth, and the new picture company three-fourths, of those outstanding at the effective date of reorganization.

(2) Of amounts payable as damages, settlements, legal fees and expenses arising from antitrust litigation, the new theatre company is to assume 100% of the liability if only Warner's exhibition business was involved, the new picture company 100% if only Warner's production or distribution business was involved, and the new theatre company 85% and the new picture company 15% if both Warner's exhibition business and its production or distribution business were involved.

(3) The new picture company is to assume liability for additional federal income or excess profits taxes assessed against Warner for years in which separate tax returns were filed, and its pro rata share of such taxes assessed on a consolidated basis.

(4) Each of the new companies is to assume all obligations of Warner relating to the assets transferred to it. And stockholders were advised in this connection that claims may be made that both of the new companies are liable on contracts with and guarantees by Warner, and that the "validity" and amount of such claims is indeterminable.

constitute a full equivalent,[11a] and we later call attention to the indicated worth and earning power of the new theatre company (*infra*, pp. 35–36). The value of the theatre company's guaranty thereby indicated is the more striking when comparison is made with the value of Warner's guaranty at the time appellant obtained it through its contract with Warner dated June 5, 1951 (R. 37).[12] And while there may be hazards in the motion picture exhibition business, there were serious hazards in the integrated business of production, distribution, and exhibition in which

[11a] Appellant has referred to upwards of $23,000,000 as the minimum rentals payable by its lessee during the unexpired term of the lease (App. Br. 9, 22). The $23,000,000 figure is accurate but without significance with respect to possible liability under Warner's guaranty. The measure of damages for breach of a long-term lease is "the present value of the rent reserved less the present rental value of the remainder of the term." *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U. S. 493, 504; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 450.

[12] On August 29, 1931, shortly after the guaranty was given, the consolidated balance sheet of Warner and subsidiaries showed total assets of $213,857,453, funded debt of $104,898,927, and capital stock and surplus of $88,845,711 (Moody's *1932 Industrial Manual*, p. 2983). At that time, therefore, Warner's capital stock and surplus was only 40% of its total assets and its funded debt represented 49% of its total assets.

Applying the provisions of the reorganization plan to Warner's assets on August 31, 1950, the new theatre company would have total assets of $92,113,628, funded debt of $3,179,208, and capital stock and surplus of $80,432,375 (p. 11 of Warner proxy statement). On the basis of these figures, its funded debt would be only 3% of total assets and its capital stock and surplus would be 87% of total assets.

Warner has been engaged.[13]

If, upon judicial test of appellant's rights in other proceedings, it should be held, notwithstanding the factors to which we have referred, that the new theatre company's guaranty would not in itself be the equivalent of Warner's guaranty, and if it should be further held, in accordance with the views of the parties to the main action, that the consent decree bars assumption of the guaranty by the new picture company, the "equivalent" which appellant claims may be otherwise obtained. The new theatre company might be required to agree to set aside funds in trust to secure fulfillment of its guaranty, or to agree to do so if its net assets or net current assets should fall below prescribed figures.[14] Appellant is not "bound" by the consent decree, within the meaning of the Rule, when the decree, even under the most remote contingencies, will not operate to bar appellant from obtaining the full measure of its legal rights.

Clause (3). The last clause of Rule 24 (a) grants intervention of right "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

[13] The hazards are illustrated by the *Paramount* case out which the present appeal arose and by "the multitude of antitrust treble damage suits now pending against the motion picture industry" (App. Br. 31, note).

[14] Compare the provision in appellant's lease as amended in 1948 requiring the making of such deposits to secure the lessee's obligation to alter and improve the leased property (R. 37).

We submit that in this case there was no property in the custody or control of the district court within the meaning of clause (3). There was no *res* which the court was administering or exercising control over. The antitrust action against Warner is an *in personam* proceeding and the court's duty is to enter a judgment against the defendant barring further violations of the statute. The consent decree entered against Warner required it to do certain things, including making certain property transfers. If it should wilfully fail to carry out these commands, it would be subject to punishment for contempt but such failure would not vest Warner's property in the court.

The district court obviously did not have control or custody of Warner's property prior to entry of the consent decree. It likewise did not obtain such control or custody upon entry of the decree. The entire decree, including its provisions as to property transfers, was to become a nullity if Warner's stockholders failed to approve the required reorganization of Warner within 90 days after entry of the decree (R. 9).

Appellant suggests that there is some significance in the change in the wording of clause (3) when the Rules of Civil Procedure were amended in 1946 (App. Br. 19). The original words were "property in the custody of the

court," and the 1946 amendment changed these words to "property which is in the custody or subject to the control or disposition of the court." The Committee Note on the change shows that it was not intended to broaden the general scope of clause (3).[15]

Appellant, in order to bring itself within clause (3), must establish not only that there was property in the custody or control of the district court, but also that it had an interest therein. In the absence of such interest, the applicant for intervention is not, within the meaning of the Rule, "adversely affected" by the court's disposition of property subject to its control. A leading authority on the Federal Rules of Civil Procedure has stated with reference to the scope and application of clause (3):

> What kind of an interest must a petitioner have in property subject to the control of the court before he can claim an absolute right to intervene? Obviously it must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the

[15] The Committee's Note on the amendment to subdivision (a) of Rule 24 reads:

"The addition to subdivision (a) (3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending."

type to be denominated a lien, equitable or legal.[16]

Clause (3) is not to be viewed as effecting a departure from the "well established principles" governing intervention of right, and it grants intervention of right only to persons having "a legal interest" in the property in the court's custody. *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del.) appeal dismissed *sub. nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C. A. 3), certiorari denied, 309 U. S. 687. Further discussing clause (3), the court said (*ibid.*):

> It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action.

In *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 556, this Court referred to the decisions holding that an order denying leave to intervene is not appealable "except where he who seeks to intervene has a *direct and immediate interest in a res* which is the subject of the suit" [italics supplied].[17] One of the cases

[16] Moore, *Federal Practice*, 2d Ed., ¶ 24.09 [2]. Accord, *Gross* v. *M. & A. Ry. Co.*, 74 F. Supp. 242, 249 (W. D. Ark.); *Board of Commissioners of Sweetwater County, Wyo.* v. *Bernardin*, 74 F. 2d 809, 815–816 (C. A. 10), certiorari denied, 295 U. S. 731.

[17] Since appeal rarely lies from denial of permissive intervention but does lie from denial of intervention which was of right, the words quoted above are a definition of intervention of right.

which the Court cited for this exception was *Swift* v. *Black Panther Oil & Gas Co.*, 244 Fed. 20, 30 (C. A. 8), which succinctly states the "well established principles" which were the basis of intervention of right prior to adoption of the Federal Rules of Civil Procedure. The court there said that intervention of right, as distinguished from permissive intervention, exists when—

> the petitioner claims a *lien upon or an interest in specific property* in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. [Italics supplied.]

The present appellant has no interest in or lien on any of Warner's property. It merely has an unsecured contract right to hold Warner if appellant's lessee should fail to perform the terms and covenants of its lease. Appellant would acquire no interest in or lien on Warner's property upon the lessee's default. Even more patently it has, prior to default, no such interest or lien. The asserted right of intervention under clause (3) fails, therefore, both because Warner's property was not in the control or custody of the district court and because appellant had no interest in or lien upon any property of Warner.

Over and above the foregoing infirmities, appellant is not within clause (3) for the reason

that it is not so situated as to be "adversely affected" by the consent decree entered by the court below. The decree requires Warner to adopt a plan of reorganization providing for transfer of its assets to two new corporations and its dissolution. The very legal principle upon which appellant relies—that when a corporation transfers its business and assets to a newly created corporation having the same stockholders, outstanding obligations of the transferor may be enforced aginst the transferee [18]—means that a corporation succeeding to Warner's assets will be liable, without any express assumption of liability, upon Warner's guaranty contract.

The parties to the main action regard the consent decree as barring assumption of Warner's guaranty by the new picture company since otherwise there would not be the complete divorcement of distribution from exhibition requisite to effective relief in the antitrust litigation. But when appellant entered into an unsecured contract by which Warner guaranteed a lease running for

[18] Appellant's brief (p. 25), citing *Northern Pacific Ry Co.* v. *Boyd*, 228 U. S. 482. At pages 7–8 of its brief in opposition to motion to dismiss and motion to affirm the principle is more fully elaborated, and appellant also cited *Bankers Trust Co.* v. *Hale & Kilburn Corp.*, 84 F. 2d 401 (C. A. 2); *Calvin* v. *Washington Properties*, 121 F. 2d 19, 25 (C. A. D. C.); *Pearce* v. *Schneider*, 242 Mich. 28; *Male* v. *Atchison, T. & S. F. Ry. Co.*, 230 N. Y. 158, 165.

Of these cases, only the *Boyd* case and the *Bankers Trust Co.* case represent decisions on the point for which they are cited.

some 90 years, appellant's rights under this contract were subject to the risk that Warner, if it infringed any law during the life of the guaranteed lease, would have to pay the penalty imposed for violation. The consent decree, assuming that it bars assumption of the guaranty contract by the new picture company, affects appellant only by removing Warner's production and distribution assets as a source of possible payment if appellant finds it necessary to enforce Warner's guaranty. This effect is no different in character from that of any judgment against Warner which would deplete its assets, for example, a large money judgment entered on a debt incurred for any corporate purpose (including embarking upon a new line of business), large money judgments entered against it for treble damages on account of antitrust law violation, or a large money judgment against it for fines imposed for violation of a state or federal statute.

If appellant is "adversely affected" by the consent decree, then so is every holder of a direct or a contingent claim against Warner since the decree does not provide for joint and several assumption of Warner's liabilities by Warner's transferees, nor does the reorganization plan adopted by Warner so provide (*supra*, note 16, pp. 18–19). To place this interpretation upon the intervention rule would mean that whenever a court is faced with the difficult task of bringing about divorcement of

the property or business of one who had offended against the antitrust laws the court would also be required (a) to determine the extent to which every third party claimant had a valid claim against the defendant, (b) to ascertain the extent to which divorcement might conceivably indirectly prejudice such claimant, and (c) to adjudicate the relief to be awarded each claimant. The rule on intervention of right plainly was never intended to have such a reach or such obstructive effect.

II

Appellant has no standing under the provisions of Rule 24 (b) to obtain "permissive intervention" and, in any event, denial of appellant's requested intervention was not an abuse of the district court's discretion

The circumstances under which the court may, in its discretion, permit intervention are set forth in Rule 24 (b) of the Federal Rules of Civil Procedure (*supra*, p. 4). Clause (2), upon which appellant relies, authorizes grant of intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."

In the instant case the main action involved only questions relating to defendant's violation of the Sherman Act and the remedies appropriate to prevent further violation. Appellant's claim, on the other hand, involved the scope of its rights under a guaranty contract "unrelated to" any antitrust violation by Warner or by any other defendant (R. 29, App. Br. 10). Appellant's

claim was that, upon transfer of Warner's property to two new corporations and its dissolution, as required by the consent decree, Warner's obligations under its guaranty contract should bind its transferees jointly and severally. This claim has no question of fact or law in common with a question arising in the main action.

On February 8, 1950, the district court had entered a judgment against Warner which required it to submit a plan providing for completion of separation of its production and distribution business from its exhibition business within three years from the date of the judgment (R. 5, 8). The motion to intervene which appellant filed in January 1951 did not question this requirement or the means for achieving it embodied in the constant decree—transfer of Warner's assets to two new companies and dissolution of Warner (App. Br. 14, 22). The claim made by appellant was that the court deal with its rights under Warner's guaranty contract either in the consent decree or "by separate order" by "ascertaining and awarding an equivalent substitute" for Warner's guaranty (App. Br. 21). The ascertainment and award of such "equivalent substitute" presents no question "in common" with a question in the main action. The question before the district court on the consent decree submitted by the parties was whether transfer of Warner's assets and its dissolution pursuant to a plan of reorganization to be adopted by Warner

would effectively achieve the divorcement which the district court had found to be essential to adequate relief in the antitrust litigation against Warner (R. 62–63, 66–68, 117). If appellant's claim had a question in common with that of the main action, then so had everyone who at the time of the consent decree had either a direct or a contingent claim against Warner.

Although permissive intervention was authorized only if appellant's claim and the main action had a question of law or fact in common, appellant's brief deals with this matter only in the last sentence on page 21. The view there expressed appears to be that because appellant asked the district court either to add something to the consent decree or to make some kind of "separate order" its claim and the main action both involved the court's action on the proposed consent decree and therefore had a "common" question. Appellant ignores the crucial consideration that the questions concerning the court's action raised by appellant lie outside, and are totally distinct from, the questions raised in the main action.

But even if it be assumed *arguendo* that Rule 24 (b) empowered the district court to grant appellant's motion for leave to intervene, it is clear that denial of the motion was not an abuse of discretion. Where the basis for intervention is an appeal "to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their

individual emphasis," the question whether or not the circumstances are such as to warrant permitting the interested outsiders to become participants in the litigation "is, barring very special circumstances, a matter for the *nisi prius* court." *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 506.

Rule 24 (b) provides that the court, in exercising its discretion, "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In the present case the court had the task of entering a judgment which would recast the business and property interests of a large and complex enterprise. Although this task was simplified when the parties formulated and agreed upon an appropriate decree, the carrying out of the provisions for divorcement and for divestiture of individual theatres inevitably entails repeated applications to the court for the determination of matters which are in dispute between the parties or for modification of particular provisions of the decree. To permit third persons to intervene to obtain adjudication of claims asserting merely that Warner's reorganization might be carried out in such a way as to impair rights of Warner's obligees would interject into the main action a host of digressive, difficult, and delaying issues.

In the hearing below Judge Hand commented that there "must have been a great many situa-

tions like this in this case," and counsel for Warner concurred (R. 220).[19] In fact, there were many like situations. Warner had guaranteed leases, on property leased to subsidiaries, involving minimum annual rentals of about $1,484,000.[20] Since the current annual rental on the property leased from appellant was $300,000 (R. 36), Warner had outstanding other lease guaranties covering annual rental payments of about $1,184,000. If appellant had been permitted to intervene, the door would have been thrown open, or at least left ajar, to intervention by the holders of these various guaranty contracts. Grant of intervention to them and to other like holders of claims against Warner would have expanded the main action beyond all reasonable bounds, and might have prevented, for an unforeseeable period, entering and carrying into effect any final judgment in the cause. In the district court hearing counsel for Warner observed that "if this Court is going to allow everybody to intervene that has a claim like that [of appellant]

[19] Judge Coxe suggested that the "problem" posed by the appellant's motion—that the required reorganization of Warner might be carried out in such a way as to impair appellant's rights under its contract with Warner—would arise in the case of any employee having a five year contract with Warner (R. 221). And Judge Hand observed that there are questions of leases, "innumerable things," affected by the consent decree which the parties had presented to the court (R. 222).

[20] See Warner's proxy statement (p. 27), referred to *supra*, note 16, p. 18.

and try to settle everyone of those claims * * *, this Court is hamstrung and we can't ever get ahead" (R. 220-221).

Appellant states that it had "no desire to disturb or delay" entry of the consent decree (App. Br. 22). But whatever appellant's desire, this would have been the necessary effect of granting intervention. The consent decree was an elaborate, interrelated document representing, as always in a situation of this kind, concessions and compromises by the opposing parties (R. 209). The district court, had it granted intervention, could have awarded the relief prayed by appellant only in one of two ways—(1) with the consent of the parties, which consent plainly was not forthcoming, or (2) by fashioning its own judgment after a full hearing involving taking of evidence, formal briefing and argument. Furthermore, both the appellant (having been allowed to intervene) and any party to the main action would have the right to appeal to this Court from the judgment thus entered. The important time schedule respecting divorcement incorporated in the consent decree, including approval of the required plan of reorganization by Warner's stockholders within 90 days after entry of the decree, would have been totally disrupted.[21]

[21] The Warner proxy statement previously mentioned (*supra*, note 16, p. 18) shows the elaborate and detailed presentation which had to be submited to Warner's stockholders, and the annual stockholders meeting was to be held in Feb-

Under the foregoing circumstances, denial of appellant's intervention motion clearly was a proper exercise of discretion, and appellant's reliance upon Rule 24 (b) is misplaced.

The remote, speculative, and contingent character of any injurious effect of the consent decree upon appellant further supports denial of its intervention motion, as a matter of discretion. At the hearing below, counsel for the United States and counsel for Warner both indicated that the reorganization plan which Warner expected to adopt would provide that the new theatre company would assume Warner's guaranty contract (R. 220).[22] The issue which appellant sought to interject—whether appellant would receive less than its due without a like assumption by the new picture company—raised the question of whether the new theatre company's assumption of liability would be an "equivalent substitute" for Warner's guaranty, a question

ruary (R. 220). Even a short delay in entering the consent decree would thus have been seriously disruptive.

As to the importance of completing divorcement by April 4, 1953, as required by the consent decree (R. 26), attention is called to the fact that this date is almost seven years after the district court first determined the issues in the case and almost five years after this Court passed on the district court's determination and judgment (see 66 F. Supp. 323; 334 U. S. 131). The main action has been pending since 1938 (*supra*, p. 4).

[22] Government counsel also stated that he was "unalterably opposed to" assumption of the contract by the new picture company since such assumption would give it an interest in the exhibition business (R. 220).

which could not be determined until Warner's reorganization had progressed to a point where the assets and earning power passing to the new theatre company had become finalized. Warner's counsel observed that the assets of the new theatre company would be "enormously more than enough" to give appellant "every assurance" (R. 220). Judge Goddard, addressing appellant's counsel, inquired: "How do you know that you won't receive complete protection?" (R. 221).

Even explicit contract or property rights against one who has violated the antitrust laws must give way where they stand as an obstacle to an appropriate antitrust judgment against the violator and the holder of such rights may not, in this situation, enforce the "letter" of his contract (*Continental Insurance Co.* v. *United States*, 259 U. S. 156, 171–173). It is thus clear that appellant was not entitled, as a matter of law, to assumption of Warner's guaranty by the new picture company. All that appellant was entitled to, and all that it has demanded, is an equivalent "substitute." Obviously such substitute can be obtained through the medium of the new theatre company, whether solely by its assumption of the guaranty or by such assumption and something more (see *supra*, p. 21).

The reorganization plan adopted by Warner provides for an allocation of assets and liabilities which gives the new theatre company, on the basis of Warner's assets and liabilities on August 31, 1950, assets of more than $80,000,000

in excess of all liabilities; and the average annual net profit (after taxes) earned during the last five fiscal years on the part of Warner's business allocated to the new theatre company was more than $10,375,000.[23] But even after submission of the reorganization plan formulated by Warner and approval of the plan by Warner's stockholders, the district court would not be in a position to determine the issue which appellant sought to interject into the main cause. Substantial changes in the assets received and the liabilities assumed by the two successor companies were expected to occur before reorganization was carried into effect,[24] which might be as much as 27 months after entry of the decree (R. 26).

Plainly the district court might, as a matter of discretion, refuse intervention where the requested intervention was, as here, based on a claim of injury which was purely speculative and contingent upon unknown future factors. If, on the actual reorganization of Warner, appellant then believes that it is being given less than its legal due, it will be free to assert in other proceedings any rights claimed against Warner

[23] Page 11 of Warner proxy statement (referred to *supra*, note 10, p. 18).

On the above basis, the net assets going to the new picture company are about $49,730,000 and the average annual net profit earned by its part of Warner's business is about $4,450,000 (proxy statement, pp. 14–15).

[24] Proxy statement, p. 5.

and Warner's transferees. Denial of permissive intervention necessarily implies that "the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding." *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. R. Co.*, 331 U. S. 519, 524.[25]

III

There is no merit in appellant's contention that, apart from the rules governing intervention, the district court was under a duty to grant appellant the relief for which it sought intervention

We have shown under points I and II that appellant had no right of intervention, and that it had no standing to invoke permissive intervention and that in any event denial thereof was not an abuse of discretion. We now take up certain contentions made by appellant which, at best, have only a tangential bearing on these central issues.

A. Appellant is not without "adequate remedy" except by intervention

Appellant contends that it "has no adequate remedy except by intervention" (App. Br. 25–27). We have previously shown that denial of intervention leaves appellant free to assert in other proceedings the rights which it has or claims under Warner's guaranty (*supra*, pp. 16–18, 36–37). The

[25] See also *supra*, pp. 16–18.

modes of relief thus available are those which would be available if Warner, pursuant to a voluntary plan of reorganization, proposed to of did transfer its assets to two new corporations and then dissolve. The relief which appellant seeks by way of intervention is that the court in the antitrust proceeding against Warner adjudicate and award the rights given appellant by virtue of the general equitable principle that a successor corporation, where the stockholders are the same, remains liable for unsatisfied obligations of its predecessor. General law, not the Sherman Act, provides the remedies for enforcing this equitable principle. Appellant, being entitled to pursue these remedies, may not set up their alleged inadequacy as ground for interjecting itself into a proceeding to which it is a stranger.

Appellant suggests that a cause of action against Warner may not accrue until default by appellant's lessee and that this may occur after Warner's corporate existence has terminated. This Court has declared that "as a matter of substantive law, the right to follow the distributed assets" of a corporation "applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims" and, that a "corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract * * *." *Pierce* v. *United States*, 255 U. S. 398, 403. The decisive consideration here, however, is that ap-

pellant's situation with respect to modes of relief is the same as it would be upon a voluntary reorganization of Warner. The procedural problems which may confront appellant in pursuing its remedies under general law are thus irrelevant.[26]

B. The district court was not under a duty to ascertain and award an equivalent substitute for Warner's guaranty

Appellant contends that it "is entitled to a judicially ascertained equivalent substitute for the Warner guaranty" (App. Br. 27–30). The Government does not dispute this general proposition; but it does dispute that appellant is entitled to intervene in the antitrust proceeding to obtain such judicial ascertainment. It also denies that *Continental Insurance Co.* v. *United States*, 259 U. S. 156, is, as appellant states, a precedent "supporting Appellant's right to have the court below ascertain and provide" such equivalent substitute (App. Br. 28).

The *Continental Insurance* case was an appeal from the judgment entered by the district court pursuant to this Court's mandate in *United States* v. *Reading Co.*, 253 U. S. 26. That case held that the defendants were parties to a combination illegal under the Sherman Act and that the district court should enter a decree dissolving

[26] Among such possible remedies are a suit for a declaratory judgment and a proceeding on equitable principles against Warner's transferees when and if default by appellant's lessee provides occasion therefor.

this combination in such a way that the holding company (Reading Company) and two of its subsidiaries (Reading Railway Company and Reading Coal Company) should each be entirely independent from the others. The holding company had outstanding some $93,000,000 of non-callable bonds secured by a mortgage covering substantially all the assets of these two subsidiaries. After remand to the district court, the trustee under this mortgage was, upon supplemental bill filed by the United States, answer by the trustee, and order of the court, made a party defendant.[27] The district court subsequently entered a decree of dissolution which, among other things, provided for merger of the Reading Company and the Reading Railway Company and left the mortgage securing the Reading Company's bond issue a lien upon all the capital stock and assets of the Reading Coal Company.

On appeal from such decree, this Court held that it did not sufficiently safeguard against "some possible measure of future control over the Coal Company" by the Reading Company (259 U. S. 167), and that changes should be made in the decree involving "a departure from the contract provisions of the general mortgage and the bonds it secures" (*id.*, 170). The district court was directed to determine the respective

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[27] *United States* v. *Reading Co.*, 273 Fed. 848, 855–856 (E. D. Pa.). See also Record in Nos. 609, 610, October Term, 1921, pp. 48–50, 139–152, 205.

values of the property of the merged Reading Company and that of the Coal Company subject to the lien of the mortgage, and to enter a decree providing that the liability of each company on the bonds and the pledge under the mortgage "shall be reduced to an amount proportionate to the ratio of the value of its pledged property to the value of all the property pledged" under the mortgage (*id.*, 173).

The Court in the *Continental Insurance* case thus found it necessary to enter a judgment in the antitrust proceeding changing in a particular manner the antitrust defendants' specific contract obligations and direct liens on their property running to others, and the legal representative of such others was a party defendant. The extent and character of the changes to be made in the contract rights and property liens running against the antitrust defendants was inherent in determining requisite relief against them under the antitrust laws. No question was before the Court similar to that in the present case—interjection into the antitrust proceeding of the extraneous issue of some remote, contingent and speculative effect of the antitrust judgment on an obligee of the defendant.

We think it sufficient answer to appellant's due process contention (App. Br. 30–32) to point out that appellant was given a hearing on its intervention motion and that the consent decree

does not foreclose appellant as to the rights which it may have by reason of Warner's guaranty.

CONCLUSION

For the foregoing reasons, the district court's order denying intervention was correct and should be upheld.[28]

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

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[28] In *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, where the Court determined that the appellant was not entitled to intervene "as of right" and that, with respect to "permissive intervention," the district court had not abused its discretion in denying intervention, the appeal was dismissed (322 U. S. 143). But in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, where the provisions of the decree which were the basis for an asserted right of intervention were eliminated by this Court on the appeal taken by the parties to the cause, the Court said that the orders of the district court denying intervention "must be affirmed" (334 U. S. 178).

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